

Appellant, a 59-year-old former mark-up clerk, injured her right knee on March 10, 1986 when she slipped and fell at work. Her claim has been accepted for right knee contusion and

torn medial meniscus.¹ For more than two decades, the Office has paid appellant wage-loss compensation for total disability.²

Over the years, appellant claimed her now-deceased husband as a dependent, as well as their three children, born December 27, 1974, July 29, 1976 and December 30, 1977. Because she had at least one eligible dependent, the Office paid her wage-loss compensation at the augmented rate of 75 percent. In 1996, following the death of her daughter, appellant gained legal custody and/or guardianship of her granddaughters, born September 9, 1985 and June 6, 1988. In addition to appellant's husband and three children, appellant claimed the granddaughters as dependents for purposes of obtaining augmented wage-loss compensation.

On March 29, 2000 appellant's husband died due to cancer. For several years following her husband's death, appellant continued to identify herself as married.³ The misleading information appellant provided the Office regarding her marital status effectively allowed her to continue receiving wage-loss compensation at the augmented rate of 75 percent.

On September 3, 2003 appellant's then 15-year-old granddaughter, gave birth to a daughter. Appellant was appointed as legal guardian on February 24, 2004. She later adopted her great-granddaughter, officially changing the child's name. The adoption was effective June 30, 2005. Appellant first listed the great-granddaughter as a dependent on her November 4, 2005 financial disclosure statement (Form EN1032).

On April 3, 2008 the Office issued a preliminary determination that appellant received an overpayment of \$18,003.68 for the period March 30, 2000 through June 29, 2005. It noted that, although appellant's husband had died March 29, 2000, she continued to claim him as an eligible dependent. Upon the death of her husband, appellant was no longer entitled to receive wage-loss compensation at the augmented rate of 75 percent. The \$18,003.68 overpayment represented the difference between gross benefits calculated at the 75 percent and 66⅔ percent rates for the

¹ Appellant underwent a partial medial meniscectomy on February 4, 1987. The surgery also revealed a torn anterior cruciate ligament. Appellant underwent a repeat arthroscopy in March 1988. On March 10, 2008 she underwent a right total knee replacement, which the Office authorized.

² The Office initially placed appellant on the periodic compensation rolls on May 29, 1987.

³ In a Form EN1032 dated February 6, 2001, appellant identified her husband, as a dependent. She also responded "Yes" to the form's questions "Are you married?" and "If yes, does your husband or wife live with you?" The 15-month period covered by the form included a 4-month period preceding John's March 30, 2000 death. However, appellant did not indicate on the February 6, 2001 form that her husband had died during the preceding 15-month period. The form specifically requests that "[i]f you are receiving compensation for a dependent and are no longer entitled to receive that compensation," state the "[d]ate the person stopped being a dependent" and the "[r]eason the person stopped being a dependent." Appellant responded "n/a." In subsequent financial disclosures (Form EN1032), she identified herself as married, but she did not represent that her husband either lived with her or that she made regular direct payments for his support. The Office appears to have first learned of the death during a January 10, 2006 telephone conversation with appellant regarding her interest in obtaining a lump-sum payment on a schedule award. Appellant reportedly advised the Office that she had been receiving Social Security death benefits from her deceased husband. But the following day, January 11, 2006, appellant signed and submitted another Form EN1032 indicating that she was currently married. The Office received a copy of the death certificate on August 28, 2006. In an October 2, 2006 Form EN1032, appellant again represented that she was married, but for the first time she included the notation "husband deceased."

above-noted period ending June 29, 2005.⁴ The Office also made a preliminary finding that appellant was at fault in creating the overpayment.

In subsequent correspondence, appellant challenged the overpayment on the basis that she “had maintained legal custody of two granddaughters since 1996....” She also noted that she had legally adopted a daughter in 2005.⁵

On June 11, 2008 the Office issued a final overpayment decision. For some unexplained reason the overpayment was reduced by \$.04 to \$18,003.64. But in all other respects, the final decision was consistent with its April 3, 2008 preliminary determination.⁶

LEGAL PRECEDENT -- ISSUE 1

Compensation for disability and schedule impairments is paid at the rate of 66⅔ percent if the employee has no dependents or 75 percent if the employee has at least one dependent.⁷ Eligible dependents include: a wife or husband, an unmarried child under 18 years of age, an unmarried child over 18 who is incapable of self-support, a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent.⁸

ANALYSIS -- ISSUE 1

Appellant appears to have conceded the fact that her husband, was no longer an eligible dependent following his March 29, 2000 death. However, there is no indication from the record that appellant subsequently remarried. Therefore, in order for her to continue to receive wage-loss compensation at the 75 percent rate she must have had at least one other eligible dependent on or after March 30, 2000. In challenging the overpayment, appellant noted that since 1996 she

⁴ The 75 percent rate was reinstated effective June 30, 2005, the date of the great-granddaughters adoption.

⁵ Appellant did not submit a recovery questionnaire or otherwise challenge the specific amount of the overpayment.

⁶ Although appellant was entitled to continuing wage-loss compensation, the Office did not indicate its intention to recover the overpayment by reducing future compensation payments.

⁷ 5 U.S.C. §§ 8105(a), 8106(a), 8107(a), 8110(b) (2006); 20 C.F.R. §§ 10.401(b), 10.403(b) and 10.404(b) (2008); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.10 (February 2002).

⁸ 5 U.S.C. § 8110(a); 20 C.F.R. § 10.405(a). A spouse is considered a “dependent” if her or she is a member of the same household as the employee. However, cohabitation is not required in all instances. Dependent status will be conferred where the husband or wife is receiving regular contributions from the employee for support or the employee has been ordered by a court to contribute to the spouse’s support. 5 U.S.C. § 8110(a)(1) and (a)(2).

had legal custody of her granddaughters. She also noted that she had adopted a daughter in 2005.⁹

Under certain circumstances, compensation will be augmented for an injured employee's unmarried "child." However, "child" and "grandchild" are not synonymous, and the latter is not specifically recognized as an eligible dependent for purposes of augmented disability compensation.¹⁰ Although appellant obtained legal custody of her two minor granddaughters in 1996, there is no indication from the record that she legally adopted either one.¹¹ Had she done so, she would have likely been able to claim at least one of them as a dependent child for the entire period March 30, 2000 through June 29, 2005.¹²

A "grandchild" is not one of the specifically enumerated dependents for purposes of receiving augmented compensation. Furthermore, guardianship or legal custody by itself does not establish dependency. Accordingly, appellant's granddaughters are not eligible dependents under the Act. Similarly, appellant's court-appointed guardianship of great-granddaughter beginning February 24, 2004, does not confer dependent status prior to the June 30, 2005 effective date of her adoption.

Appellant's marital status changed as of the death of her husband on March 29, 2000. Subsequently, she did not have any eligible dependents prior to the June 30, 2005 adoption of the great-granddaughter. Therefore, appellant was not entitled to receive augmented wage-loss compensation for the period March 30, 2000 through June 29, 2005. Neither she nor her counsel specifically challenged the Office's calculation of the overpayment. Accordingly, the Board affirms the Office finding with respect to the fact of overpayment and the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹³ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she

⁹ Although not specifically raised on appeal, the Board notes that in her October 22, 2002 Form EN1032, appellant continued to identify her adult children, as dependents for compensation purposes. However, their respective ages disqualify them as dependents and there is no indication from the record that either child was incapable of self-support at the time.

¹⁰ *Jacqueline S. Harris*, 56 ECAB 252, 255 (2005). The definition of a "child" includes stepchildren, adopted children, and posthumous children, but does not include married children. 5 U.S.C. § 8101(9). The Federal Employees' Compensation Act separately defines "grandchild" for purposes of identifying eligible beneficiaries to certain death benefits under 5 U.S.C. §§ 8109 and 8133. *Id.* at § 8101(10).

¹¹ One granddaughter attained the age of 18 on September 9, 2003, and by January 2004, she was no longer a member of appellant's household. According to appellant, custody had been transferred to her paternal grandmother. The other granddaughter did not attain the age of majority until June 6, 2006.

¹² 5 U.S.C. § 8101(9); *Jacqueline S. Harris*, *supra* note 10.

¹³ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

receives from the Office are proper.¹⁴ A recipient will be found to be at fault with respect to creating an overpayment if the individual “[a]ccepted a payment which he or she knew or should have known to be incorrect.”¹⁵

ANALYSIS -- ISSUE 2

As early as May 29, 1987, appellant was made aware of the fact that she was being compensated at the 75 percent rate because of one or more dependents. When she was first placed on the periodic compensation rolls more than two decades ago, appellant was instructed to inform “[the] office immediately of any change ... in the status of any dependents claimed ... to establish entitlement to additional compensation.” The May 29, 1987 notification also included the following statement: “I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for resulting overpayments. I am also aware that any falsification or willful omission may result in criminal prosecution.” On June 28, 1987 appellant signed the above-noted statement and returned it to the Office.

The Board finds that appellant repeatedly accepted payments she knew or should have known to be incorrect. Not only did the initial award notification advise appellant of her responsibility to correctly identify her eligible dependents, but she was also reminded of this obligation on an almost annual basis. The record includes more than 15 financial disclosure statements that appellant submitted over the years. Part C of Form EN1032, entitled “Dependents,” describes the applicable compensation rates for an individual with dependents (75 percent) and without dependents (66⅔ percent). The form also describes who and under what circumstances a person can be claimed as a dependent. While a husband and an unmarried child are included in the list of eligible dependents, a grandchild is not. After providing general information about compensation rates and eligible dependents, Form EN1032 specifically inquires about one’s marital status, whether one is claiming compensation on account of other dependents, such as children, and whether there have been any changes in dependent status that might effect entitlement. Part H of the form includes a certification that reads in part: “I understand that I must immediately report to OWCP ... any change in the status of claimed dependents....” Appellant presumably read Form EN1032 on at least a dozen occasions and signed the above-noted certification.

Given the specificity of Form EN1032, appellant knew or should have known that she was not entitled to claim her deceased husband as a dependent. As to the eligibility of the granddaughters, while appellant claimed her granddaughters as dependents as early as January 1997, there is no indication that the Office either confirmed or otherwise acknowledged them as dependents for purposes of appellant’s entitlement to augmented compensation. Moreover, based on the specific information included in Form EN1032, appellant knew or should have known that her granddaughters were not eligible dependents, including her great-granddaughter prior to her formal adoption. The Board, therefore, agrees with the Office’s finding that appellant was at fault in creating the overpayment of benefits. For more than five

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.433(a)(3).

years, she accepted payments she knew or should have known to be incorrect. Because appellant was at fault, she is not eligible for a waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of \$18,003.64 for the period March 30, 2000 through June 29, 2005. The Board further finds that appellant was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board